

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**ANGELA PHELPS, ET AL.**

**APPELLANTS,**

**v.  
CITY OF KANSAS CITY, MISSOURI**

**RESPONDENT.**

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DOCKET NUMBER WD74287

DATE: May 29, 2012

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Appeal From:

Clay County Circuit Court  
The Honorable Larry D. Harman, Judge

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Appellate Judges:

Division Three: Thomas H. Newton, Presiding Judge, James M. Smart, Jr., Judge and Gary D. Witt, Judge

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Attorneys:

Charles R. Dickman, Kansas City, MO, for appellants.

Douglas McMillan, Kansas City, MO, for respondent.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
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**APPELLANTS,**

**v.**

**CITY OF KANSAS CITY, MISSOURI,**

**RESPONDENT.**

No. WD74287

Clay County

Before Division Three: Thomas H. Newton, Presiding Judge, James M. Smart, Jr., Judge and Gary D. Witt, Judge

Angela Phelps and Lynn Dill (collectively "Phelps") appeal the judgment of the circuit court that granted the City of Kansas City, Missouri's motion to dismiss the cause of action on the pleadings.

Christopher Dill, ten years old, tragically died while walking in a field adjacent to a street near his school on a rainy day on May 30, 2007. He fell into a ditch filled with running water and was sucked into a drainage pipe, where he drowned despite the efforts of volunteers and emergency responders. His parents, Angela Phelps and Lynn Dill, brought suit against the City of Kansas City and the North Kansas City School District on August 8, 2007 in Clay County Circuit Court, alleging negligence in the maintenance or operation of the drainage system and that the condition of the property constituted a dangerous condition.

The City moved to dismiss for failure to state a claim under Rule 55.27, contending that Phelps had failed to plead the necessary elements to support waiver of the City's sovereign immunity. Specifically, the motion stated that the drainage ditch was owned by the District and not the City, and claimed that ownership of the property is essential to implicate any waiver of sovereign immunity. The trial court granted the City's motion to dismiss on February 8, 2008. Phelps appealed and this Court reversed and remanded the trial court's judgment on the basis that the City was not entitled to sovereign immunity. *Phelps v. City of Kansas City*, 272 S.W.3d 918 (Mo. App. W.D. 2009).

On remand, Phelps filed their Third Amended Petition, which, *inter alia*, did not name the District as a defendant in light of the fact that Phelps and the District had entered into a settlement. Subsequently, on September 23, 2010, the City once again filed a motion to dismiss Phelps' lawsuit on the basis of sovereign immunity. On July 27, 2011, the trial court again granted the City's motion to dismiss under Rule 55.27.

## REVERSED AND REMANDED

Division Three holds:

The trial court dismissed Phelps' Third Amended Petition on the basis that plaintiffs' claims "are barred by the doctrine of Sovereign Immunity, and the Court further finds there has been no waiver of that doctrine, pursuant to Section 537.610. Under the doctrine of sovereign immunity, public entities are immune from suit for their negligent acts unless the General Assembly has expressly waived such immunity.

On appeal, Phelps contends that two exceptions to sovereign immunity apply herein, and that therefore the City is *not* immune from the instant lawsuit. Phelps asserts that the "trial court erred in granting the City's Motion to Dismiss for failure to state a claim upon which relief may be granted on sovereign immunity grounds because under well-established Missouri common law, sovereign immunity shall not shield the municipality in the performance of a proprietary act in that (1) the City's operation and maintenance of a fee-for-use storm water drainage system benefits the City in its corporate capacity; and (2) Christopher drowned as a result of the design and maintenance of the City's fee-for-use storm water drainage system."

The City does not dispute that, pursuant to Missouri law, the City does not enjoy sovereign immunity if its conduct in question constituted a "proprietary function" rather than a "governmental function." Here, Phelps, in her Third Amended Petition, pleads facts that "the City's negligent operation of its storm water drainage system" caused the child to drown, and that "the City operated the storm water drainage system for a fee and as a proprietary function." *Id.* at 3; 6. Missouri law is clear that by pleading that the injuries were caused by city-constructed drainage systems, plaintiff pleaded facts showing an exception to sovereign immunity because the operation of municipal drainage systems is, as a matter of law, a proprietary function.

Here, the City fails to grasp the gravity of the averments in Phelps' Petition when the City argues on appeal "that the 'storm water drainage system' did not cause Dill's death – the bar across the inlet pipe caused the death." But as alleged by Phelps in detail in their Petition, the Inlet Pipe was part and parcel of the drainage system that was created, operated, and controlled by the City. When the petition alleges that the death was caused by faulty design and construction of the storm water drainage system and the City admits that the death was caused by that storm water drainage system, we must conclude that the trial court erred in holding that the City was immune to suit while engaging in this "proprietary function." Point Two is granted.

In Point Three, Phelps argues that the trial court also erred "in granting the City's motion to dismiss for failure to state a claim upon which relief can be granted on sovereign immunity grounds because under Section 537.600.1, sovereign immunity shall not shield the sovereign from liability for injuries caused by a dangerous condition of a public entity's property in that (1) owning the property where injury occurred in fee simple absolute is not a requirement for a Section 537.600.1(2) waiver of sovereign immunity; (2) the City had a prescriptive easement where Christopher drowned; and (3) to constitute a public entity's property for purposes of

Section 537.600.1(2), exclusive control or possession of the property where injury occurred is not required.”

We conclude that the petition contained a sufficient factual basis, to support a cause of action that the child’s death was caused by the “dangerous condition” of the municipality’s property, and that therefore the trial court erred in finding that the City was immune from suit because the City waived its immunity pursuant to this distinct and different legal basis than the argument raised in Point Two.

In order for property to be considered that of the sovereign for the purpose of waiver immunity under section 537.900.2, the sovereign must have the exclusive control and possession of that property. Here, taking Phelps’ pleaded averments as true, as we must, we conclude that the Petition does in fact state a cause of action alleging that the City had possession and control over the street, the drainage pipes and the drainage ditch in question sufficient to meet this requirement. Here, pursuant to our standard of review in considering a trial court’s grant of a motion to dismiss, we conclude that the Court erred in dismissing Phelps’ Petition under the City’s sovereign immunity pursuant to Section 537.600.1(2).

The judgment of the circuit court is reversed and remanded.

Opinion by Gary D. Witt, Judge

May 29, 2012

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